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PRESIDING OFFICER'S  
RULING NO. MC98-1/2

AUG 11 12 03 PM '98

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268

Mailing Online Service

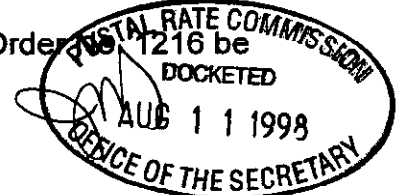
Docket No. MC98-1

**RULING DENYING MOTIONS TO POSTPONE  
PREHEARING CONFERENCE AND IDENTIFYING  
TOPICS FOR DISCUSSION**

(August 11, 1998)

Order No. 1216 gave notice that the Postal Service filed a Request with the Commission for consideration of requests under rules 67 and 161. These rules establish procedures for the expeditious consideration of experiments and market tests, respectively. An important aspect of these rules are procedures to ascertain at an early stage of consideration, the extent to which there are material issues of fact that participants consider to be in controversy. As contemplated by those rules, Order No. 1216 directed that participants wishing to dispute genuine issues of material fact raised by the Postal Service Request for a market test should file a statement to that effect by August 12, 1998. That order also directed participants to identify by August 12, 1998, issues raised by the Service's request for authority to conduct an experiment. A prehearing conference was scheduled for August 14, 1998 to discuss appropriate procedures for considering the Service's requests.

On July 30, 1998, David Popkin filed a Motion to Extend Deadline requesting that he be granted additional time to submit the filings due on August 12, 1998. On August 6, 1998, a Motion by Mail Advertising Service Association International to Extend Time for Prehearing Statements and Continue Prehearing Conference (MASA Motion) also requested that the procedural dates established by Order No. 1216 be



deferred. MASA suggests that participant filings scheduled for August 12, 1998, be deferred until August 21, 1998; and that the prehearing conference be rescheduled for August 25, 1998. Both motions argue that additional time is necessary to allow participants to receive responses to discovery and thereby develop more informed and responsive statements of issues. Presiding Officer's Ruling MC98-1/1 directed that responses to the MASA Motion be filed August 10, 1998.

The Postal Service filed a response in opposition to both motions. The Office of the Consumer Advocate (OCA) supported the MASA Motion and filed a separate Motion to Reschedule all Procedural Dates Established in Commission Order No. 1216. OCA contends that since the start up date for the market test has been delayed "one month, at a minimum," procedural dates in this docket can also be deferred. It suggests that filings due August 12 become due September 11, 1998, and the prehearing conference be rescheduled for September 16, 1998. Finally, Douglas Carlson indicated in a facsimile his intention to file an answer in support of the MASA Motion.

The Commission is facing an unusual situation in this case, resulting from the Postal Service's request for two expedited recommended decisions on separate phases of its Mailing Online Service test. As detailed in its Request, the Postal Service would like to conduct a brief market test of the proposed service prior to its introduction as an experimental mail classification with a two-year duration. The market test would be conducted while the Commission considers the establishment of the experimental service.

The Postal Service initially sought a decision on the market test by the end of August because it hoped to commence the test (with interim fees recommended by the Commission) in early September of this year. Postal Service Request at 2-3.<sup>1</sup> The

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<sup>1</sup> In its responses to discovery, the Service now indicates that the market test will not be ready to begin until October 1, 1998. See Footnote to the Response of witness Garvey to OCA/USPS-T1-11. The Service should clarify the status of plans for initiation of both the market test and experimental service at the prehearing conference.

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interim market test fees would remain in effect pending the Commission's issuance of a recommended decision on the proposed experimental mail classification, and would expire upon implementation of the requested experimental service, or within 3 months of a decision rejecting the latter proposal. If the Commission recommends the experimental classification and associated fees, the Service hopes to implement them along with the new rates and fees that the Governors have decided to put into effect on January 10, 1999, in connection with R97-1. The Commission must issue a recommended decision on the market test by the end of next month and on the experimental service before the end of the year<sup>2</sup> in order for the market test and experimental service to proceed on the Postal Service's ambitious timetable.

The initial Postal Service Request for a decision on the market test by the end of August allowed little time for evaluation even in the context of the Commission's rules outlining procedures for expedited review of market test proposals. The Commission and the Postal Service worked cooperatively to develop procedures for dealing with proposals for market tests on a fast-track basis. These rules "allow for consideration of proposed market tests within 90 days, consistent with the procedural due process rights of interested persons." 39 C.F.R. § 3001.164. Thus, it should have come as no surprise to the Postal Service if its request for a decision before September could not have been satisfied consistent with the due process rights of interested parties: the Postal Service's date of filing (July 15) only allowed 45 days for consideration of the market test proposal rather than the 90 days prescribed by this Commission's rules of practice.

Nonetheless, it may be possible for the Commission to act relatively quickly on the market test proposal, as contemplated by the rules of practice. Participants should be sufficiently familiar with the general attributes of the Postal Service proposals, based on prefiled testimony and answers to discovery, to submit written statements

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<sup>2</sup> In a motion filed concurrently with its Request, the Postal Service asks that the Commission issue its recommendation on the experimental service by the end of November. Motion of the United States Postal Service for Expedition, and for Waiver of Certain Provisions of Rule 161 and Certain Provisions of Rule 64(h), July 15, 1998, at 1.

responsive to Order No. 1216, and to discuss at a prehearing conference how procedures can be developed to assure participants due process while moving forward to consider the Service's requests expeditiously.

I am considering bifurcating the docket into two phases, primarily in order to further expedite the proceedings: phase one would examine the market test and phase two would concern the experimental service.<sup>3</sup> I request that all participants be prepared to discuss this possibility, and to offer alternatives if they believe bifurcation would be impractical. This approach would be effective if I am correct in anticipating that the market test will not generate as much controversy as the proposed experimental service.

Although the two proposals are similar, they differ substantially in scope, scale and impact. The proposed market test would necessarily have a more limited impact in the marketplace, involving only one or two printers, USPS-T-1 at 5-6, and providing service to a maximum of 5000 simultaneous customers in the Northeast.

In contrast to the small scale of the market test, the proposed experiment may involve the Postal Service contracting with up to 25 printers dispersed across the nation. The experimental service would be available to many more customers, including nonprofit organizations seeking the nonprofit rates. Request at 2. A nationwide two-year experiment undoubtedly would have a greater impact than the market test.

If no participants wish to present testimony concerning the market test, as opposed to the nationwide experiment, less time needs to be set aside for consideration of the market test, enabling a decision on it to be issued more quickly than if the two proposals were to be considered concurrently. Additionally, if oral cross-examination of the Postal Service witnesses will address only issues related to the experiment, an expedited schedule for receiving relevant evidence and filing briefs on

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<sup>3</sup> The Commission rules allow more time for consideration of a request for broad experimental authority than for a market test, compare rule 67d with rule 163.

the market test can be established. This would allow for more efficient and effective participation by intervenors and the Service.

In order to measure participants' level of concern about the market test, I am requiring participants to be prepared to indicate at the prehearing conference both the issues relevant to the market test that they might need to explore through oral cross-examination, and whether they will present rebuttal testimony relevant to the market test. Participants should also be prepared to discuss other advantages or disadvantages of bifurcating the docket into phases, and whether bifurcation would be an effective procedural device for expediting the docket.

Determining if time should be allotted for hearings and the receipt of rebuttal testimony on the market test proposal is one important factor in evaluating if establishing a separate phase for the market test is the best approach. In addition, the Postal Service should be prepared to identify what prefiled testimony pertains to each of its proposals and whether the testimony can be separated into portions relevant to its two requests. If this were possible, it could facilitate consideration of each of the Service's proposals in a separate phase. If, as seems to be the case, much of the same testimony is offered to support both of the requested recommended decisions, the Service may need to have its witnesses available for oral cross-examination twice.

One purpose of a market test is to develop information useful in evaluating whether a nationwide service might be desirable. The Postal Service should be prepared to discuss what types of information collected during the market test might be available to the Commission and the participants evaluating its request for authority to conduct a nationwide Mailing Online experiment, and when such information could be provided. Data on the accuracy of information services cost estimates and the depth of sort characteristics of varying volumes could be particularly useful.

Each of the participants requesting delay, David Popkin, MASA, and OCA have been actively engaged in discovery on the Postal Service. It is evident that these participants are fully meeting their obligation to attempt to identify material issues in a timely fashion. Although the Postal Service is providing prompt responses, as

contemplated by Order No. 1216, it is quite likely that these participants have not identified all issues that might be areas of contention. Nonetheless, I believe participants should be able to generally indicate whether they intend to present evidence in opposition to either the market test, or experimental authority, and the topics that such testimony would cover. If participants remain uncertain as to whether testimony will be required on a particular subject, that information can also be provided at the prehearing conference. Finally, in its Response to the motions for delay, the Postal Service identified topics it wished to raise at the prehearing conference.

While the Commission is prepared to consider the issues raised by the Service's Request promptly, it is committed to assuring all interested parties an adequate opportunity to explore the ramifications of the market test and experimental service. Consequently, participants should be prepared to discuss at the August 14, 1998, prehearing conference the most efficacious way for this case to proceed. If additional conferences appear to be necessary to clarify unresolved issues, they can be scheduled.

#### RULING

1. All participants should be prepared to discuss at the prehearing conference whether it makes sense to consider the market test and experimental service proposals in separate phases.

2. The Postal Service should be prepared to discuss what testimony relates to the market test proposal.

3. The Postal Service should be prepared to discuss the nature of the data from the market test that it will provide the Commission, as well as the timing of the provision of the data.

4. All participants should be prepared to indicate at the prehearing conference whether they intend to offer rebuttal testimony concerning the proposed market test.

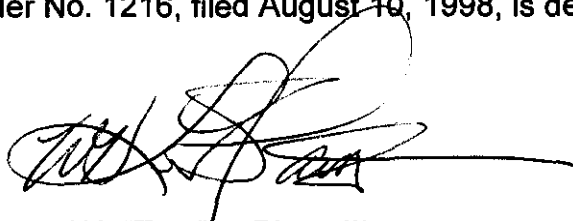
5. All participants should be prepared to identify at the prehearing conference the issues of fact relevant to the market test that they believe require oral cross-examination.

6. Responses to discovery will continue to be provided within 10 days.

7. The David Popkin Motion to Extend Deadline, filed July 30, 1998, is denied.

8. The Motion by Mail Advertising Service Association International to Extend Time for Prehearing Statements and Continue Prehearing Conference, filed August 6, 1998, is denied.

9. The Office of the Consumer Advocate Motion to Reschedule All Procedural Dates Established in Commission Order No. 1216, filed August 10, 1998, is denied.

A handwritten signature in black ink, appearing to read 'W.H. LeBlanc III', with a long horizontal flourish extending to the right.

W.H. "Trey" LeBlanc III  
Presiding Officer